

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

NO. CR. S-97-054 WBS

Plaintiff,

v.

ORDER

TANH HUU LAM,

Defendant.

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Defendant has filed what is captioned as a Motion to Vacate Guilty Plea, pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure, and Rule 60(b) of the Federal Rules of Civil Procedure. The United States moves to dismiss the motion.¹

The grounds asserted in support of defendant's motion are the same as those which were raised, or at least could have been raised, in his earlier motion under 28 U.S.C. § 2255 filed

¹ The court considers the United States' motion, although not filed within the time limits imposed by this court's Order of January 24, 2005, because of the confusion created by defendant proceeding in both the Court of Appeals and in this court at the same time, and because defendant has not been prejudiced by the government's delay in filing its motion.

1 on October 22, 2002. The Court of Appeals affirmed this court's
2 denial of that motion, and on January 21, 2005 denied defendant's
3 request to file a second or successive motion.

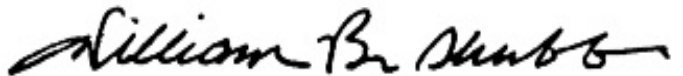
4 The filing of second or successive motions under
5 section 2255 is prohibited unless the petitioner has obtained
6 certification to do so from the Court of Appeals. 28 U.S.C. §
7 2244. United States v. Allen, 157 F.3d 661, 664 (9th Cir. 1998).
8 Rule 60(b) may not be used to circumvent the prohibitions of
9 section 2244. See Thomas v. Calderon, 151 F.3d 918, 920-21 (9th
10 Cir. 1998). There is no colorable claim of mistake,
11 inadvertence, surprise, excusable neglect, newly discovered
12 evidence, fraud, misrepresentation, or other misconduct of an
13 adverse party here. Cf. Rodwell v. Pepe, 324 F.3d 66, 60 (1st
14 Cir. 2003), cited by defendant. The instant motion is therefore
15 barred by the provisions of section 2244.

16 IT IS THEREFORE ORDERED that the United States' motion
17 to dismiss defendant's motion to vacate guilty plea be, and the
18 same hereby is, GRANTED;

19 IT IS FURTHER ORDERED that defendant's motion for
20 summary judgment be, and the same hereby is, DENIED;

21 AND IT IS FURTHER ORDERED that defendant's motion to
22 vacate guilty plea be, and the same hereby is, DISMISSED.

23 DATED: May 2, 2005

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26 WILLIAM B. SHUBB
27 UNITED STATES DISTRICT JUDGE
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